91-1485

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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1991

DANIEL VASQUEZ, Warden, and DANIEL E. LUNGREN, Attorney General of the State of California,

Petitioners,

v.

JOHN G. BROWN,

Respondent.

APPENDICES TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN G. BROWN,	)	No. 90-56127
Petitioner-Appellee,	)	
v.	)	D.C. No. CV-90-2815-AWT
DANIEL VASQUEZ, Warden, DANIEL E. LUNGREN, Attorney General of the State of California,	)	OPINION
Respondents-Appellants,	)	

Appeal from the United States District Court for the Central District of California
A. Wallace Tashima, District Judge, Presiding

Argued and Submitted August 29, 1991
Pasadena, California

Filed December 31, 1991

Before: FLETCHER, THOMPSON and LEAVY, Circuit Judges.

Opinion by Judge Thompson

THOMPSON, Circuit Judge:

FACTUAL BACKGROUND

John G. Brown is a California state prisoner who has been sentenced to death. His conviction and sentence were affirmed by the California Supreme Court. People v. Brown, 46 Cal.3d 432, 250 Cal. Rptr. 604, 758 P.2d 1135 (1988). His petition for a writ of certiorari was denied by the United States Supreme Court. Brown v. California, 489 U.S. 1059 (1989). His petition for a writ of habeas corpus filed with the California Supreme Court was denied. His execution was scheduled for June 8, 1990.

On June 1, 1990, Brown, proceeding pro se, filed in the United States District Court for the Central District of California a "Request for Appointment of Counsel in Death Sentence Case and For Stay of Execution of Death Sentence." In an accompanying declaration he stated that he was under imminent sentence of death,

that the attorney who represented him in state court was unavailable to represent him in his federal habeas proceeding, and that he could not afford to retain an attorney. He further stated: "I intend to file a petition for writ of habeas corpus in this Court, alleging federal constitutional errors which entitle me to relief from the judgment of death. I need the assistance of counsel in preparing and litigating the petition."

Pursuant to its Local Rule 26.8.7 (b),[1] the district court ordered Brown's

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1. Local Rule 26.8.7(b) provides, in relevant part:

> Where counsel in state court proceedings . . . is . . . not available or qualified to proceed, the selection panel will designate an attorney from the panel who will assist an indigent petitioner in filing pro se applications for appointment of counsel and for temporary stay of execution. Upon filing of this application the district court shall issue a temporary stay of execution and appoint counsel from the panel of attorneys certified for appointment. The temporary stay will remain in effect for forty-five (45)

execution stayed for forty-five days. The district court subsequently extended the stay for an additional thirty days, citing as a primary reason difficulty in finding appointed counsel to represent Brown. On July 30, 1990, counsel was appointed to represent Brown. On August 10, 1990, at appointed counsel's request and pursuant to the Central District's Local Rule 26.8.7(c),[2/] the district court granted an

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days unless extended by the court.

2. Local Rule 26.8.7(c) states that:

> Where counsel new to the case is appointed, upon counsel's application for a temporary stay of execution accompanied by a specification of nonfrivolous issues to be raised in the petition, the district court shall issue a temporary stay of execution unless no nonfrivolous issues are presented. The temporary stay will remain in effect for one hundred twenty (120) days to allow newly appointed counsel to prepare and file the petition.

Following his appointment, Brown's attorney satisfied the requirements of this section by identifying six nonfrivolous and independent constitutional issues which he intended to raise in the habeas

additional stay of 120 days to afford appointed counsel time to prepare and file Brown's habeas petition.

The state respondents moved to vacate the stay of execution. They contended the district court lacked jurisdiction because Brown had not filed a petition for habeas corpus relief, and thus, they argued, there was no proceeding pending before the district court on which to predicate a stay order under 28 U.S.C. 2251.[3/]

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corpus petition. Brown v. Vasquez, 743 F. Supp. 729, 732 n. 10 (C.D. Cal. 1990).

3. This section provides:

A justice or judge of the United Stated before whom a habeas corpus proceeding is pending may, before final judgment or after final judgment of discharge, or pending appeal, stay any proceeding against the person detained in any State court or by or under the authority of any state for any matter involved in the habeas corpus proceeding.

After the granting of such a stay, any such proceeding in any state court or by or under the authority of any state shall be void. If no stay is granted, any such proceeding shall be as valid as if no habeas corpus proceedings

The district court denied the motion. It held that it had jurisdiction under the All Writs Act[4/] to issue any orders necessary to preserve its potential jurisdiction, including a stay of execution in anticipation of the filing of a petition for a writ of habeas corpus. Brown v. Vasquez, 743 F. Supp. 729, 732 (C.D. Cal. 1990). The state respondents appeal. We affirm, although for reasons

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or appeal were pending.

28 U.S.C. 2251.

4. The All Writs Act appears at 28 U.S.C. 1651 (a). It provides that, "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Appellants argue that the All Writs Act is superseded for purposes of this case by 28 U.S.C. 2283 (the Anti-Injunction Act), and therefore cannot serve as the jurisdictional basis for the district court's action. We do not address the merits of this claim because we conclude that 28 U.S.C. 2251 provides an adequate independent basis for the district court's exercise of jurisdiction.

different from those stated by the district court.

DISCUSSION

The issue presented by this appeal is whether a district court has jurisdiction to stay the execution of a state prisoner in order to appoint counsel to assist the prisoner in preparing and filing a petition for federal habeas corpus relief. We conclude a district court has such jurisdiction. We have appellate jurisdiction under 28 U.S.C. 1292 (a)(1)[5].

When a death penalty prisoner has a habeas corpus proceeding pending before a federal district court, that court has jurisdiction to stay the prisoner's execution. 28 U.S.C. 2251. Appellants

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5. This section provides, in relevant part, that, "[t]he courts of appeals shall have jurisdiction of appeals from . . .[i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions . . . ."

contend that a "habeas corpus proceeding" cannot be considered "pending" before a district court under section 2251 until something has been filed with the court that can be interpreted as a petition for a writ of habeas corpus.[6/] Appellants point out that what Brown filed was not a habeas petition, but simply a request and declaration seeking appointment of counsel to help him prepare a habeas petition. We agree that what Brown filed should not be interpreted as a petition for a writ of

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6. The procedural and substantive requirements for a petition for a writ of habeas corpus are found at 28 U.S.C. 2242. This section is augmented by Rule 2 of the Rules Governing Section 2254 Cases in the United States District Courts.

habeas corpus.[7] But this does not end the inquiry.

The Supreme Court has recognized that "[t]he writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." Harris v. Nelson, 394 U.S. 286, 290-91 (1969). It is, in essence, "the first line of defense against constitutional violations." Bounds v. Smith, 430 U.S. 817, 828 (1977).

Given the fundamental importance of the writ, it is essential that it be

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7. While recognizing that the federal courts have a responsibility to construe liberally pro se prisoners' vaguely-framed pleadings as habeas petitions where the interests of justice demand, see e.g., Tyler v. United States, 929 F.2d 451 (9th Cir. 1991) (construing "Motion under 28 USC 2255" as a petition for habeas under 28 U.S.C. 2241); Tucker v. Carlson, 925 F.2d 330 (9th Cir. 1990) (section 1983 and Bivens action construed as habeas), what Brown filed here was a request for counsel to help him prepare and file a petition, not, in itself, a petition for writ of habeas corpus.

"administered with the initiative and flexibility essential to insure that miscarriages of justice within its reach are surfaced and corrected." Harris, 394 U.S. at 291. The Court has "consistently rejected interpretations of the habeas corpus statute[8/] that would suffocate the writ in stifling formalisms or hobble its effectiveness with the manacle of arcane and scholastic procedural requirements." Hensley v. Municipal Court, 411 U.S. 345, 350 (1973).

In Hensley, the Court was called upon to determine whether a state prisoner who had been released on his own recognizance was "in custody" for purposes of the federal habeas corpus statute.9/ In

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8. The federal habeas corpus statute is set forth at 28 U.S.C. 2241 to 2255.

9. In Hensley, the Court was interpreting section 2241(c)(3) which limits the availability of habeas corpus relief to a prisoner who "is in custody in violation of the Constitution or laws

holding that habeas relief is not restricted to situations where the petitioner is subject to present physical confinement, the Court emphasized that "habeas corpus is not `a static, narrow, formalistic remedy,' but one which must retain the `ability to cut through barriers of form and procedural mazes.'" Id. at 349-50 (quoting Jones v. Cunningham, 371 U.S. 236, 243 (1963), and Harris, 394 U.S. at 291).

The Harris admonition to interpret the federal habeas corpus statute with "initiative and flexibility" is especially relevant in the present case in light of the Court's recent decision in McClesky v. Zant, 111 S. Ct. 1454 (1991). In McClesky, the Court held that the doctrine of abuse of the writ[10/] barred a prisoner

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or treaties of the United States."

10. The doctrine of abuse of the writ "refers to a complex and evolving body of equitable principles" which

from asserting a constitutional claim in a subsequent federal habeas corpus proceeding when he had not raised the claim in his initial federal application and could not show either good cause for failing initially to raise the claim and prejudice resulting from such failure, or that fundamental miscarriage of justice would result if the claim were not entertained. McClesky, 111 S. Ct. at 1470. The Court also restated its position taken in Antone v. Dugger, 465 U.S. 200, 205-06 & n. 4 (1984) (per curiam), that a habeas petitioner will not be excused from failing to raise a claim in his first federal petition on the ground that his counsel had to prepare the first petition in haste and did not have

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determine whether a habeas corpus petitioner can bring a federal constitutional claim in a habeas action when he failed to assert the claim in a prior habeas proceeding. McClesky, 111 S. Ct. at 1467.

time to become familiar with the case. McClesky, 111 S. Ct. at 1467.

Given the teaching of McClesky, a prisoner applying for habeas corpus relief in federal court must assert all possible violations of his constitutional rights in his initial application or run the risk of losing what might be a viable claim. This is a substantial burden. Compounding this burden, the petitioner is often illiterate or poorly educated and yet must decipher a complex maze of jurisprudence in order to determine which of his constitutional rights, if any, may have been violated. Such a task is "difficult even for a trained lawyer to master," and, understandably, is often beyond the abilities of most prisoners. Murray v. Giarratano, 492 U.S. 1, 28 (1989) (Stevens, J., dissenting). It is thus not surprising that when a prisoner attempts to prepare his own habeas petition without

the assistance of counsel, the product of his efforts is often a confusing and incomprehensible amalgam of claims which not only fails to protect the prisoner, but which ties up valuable court time in the inevitable struggle to comprehend what it is that is being alleged.[11]

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11. In a report of the Committee on Habeas Corpus, a group of circuit judges addressed the problems faced by the judiciary in dealing with pro se for petitions for habeas relief:

> Much of the judges' time is spent trying to decipher and interpret the chaotic papers that come to them from prison inmates. Many of the petitioners are illiterates, or person of limited education who depend upon "jail-house lawyers" for assistance in preparing these documents. Not only are such practitioners notorously unreliable, but their work product is often a mass of confused and incomprehensible mumbo-jumbo.

Application for Writs of Habeas Corpus and Post Conviction Review of Sentences in the United States Courts, 33 F.R.D. 364, 384 (1963). See also, Marshall W. Krause, A Lawyer Looks at Writ-Writing, 56 Calif. L. Rev. 371, 376 (1968) ("the

The Supreme Court has recognized the inherent problems faced by prisoners, and by the courts, when prisoners are forced to file habeas petitions pro se. In Johnson v. Avery, the Court held that a state could not bar prisoners from furnishing assistance to other prisoners in filing habeas corpus petitions. It recognized, however, that even with the help of experienced prison "writ-writers," petitions filed without the assistance of an attorney are "often so unskillful as to a burden on the courts with receive them." 393 U.S. 483, 488 (1969). In his concurrence, Justice Douglas argued that the pre-petition assistance of an attorney would greatly benefit both the prisoner and the court system:

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number of frivolous petitions filed would be greatly reduced if prisoners could have an objective evaluation of their chance before filing their petitions").

> A lawyer, after examining the prisoner's transcripts or conducting an independent investigation of the facts, could immediately advise him on a course of action. Lacking the money to hire a lawyer, the prisoner must spend considerable time researching the law, preparing the required legal documents, and filing them. Sometimes years pass before the prisoner discovers what a lawyer could have told him in several weeks - that his case either has or lacks merit. The prisoners who have militantly prosecuted frivolous actions have wasted time they could have devoted to preparing themselves for release from prison. The state, by shouldering these indigent prisoners with the responsibility of acting as their own counsel, has dissipated the taxpayers' money in wasted manpower and court costs.

Id. at 494 , n. 10 (Douglas, J., concurring) (quoting Charles Larsen, A Prisoner Looks at Writ-Writing, 56 Calif. L. Rev. 343, 345-346 (1968)).

Notwithstanding the foregoing, as the Court in McClesky reasserted, there is no constitutional right to counsel in federal habeas corpus proceedings, McClesky, 111

S. Ct. at 1471, citing Pennsylvania v. Finley, 481 U.S. 551, 555 (1987), even if the habeas petitioner may be facing a sentence of death. Murray, 492 U.S. at 10. In his concurrence in Murray, however, Justice Kennedy recognized that "[t]he complexity of our jurisprudence in this area . . . makes it unlikely that capital defendants will be able to file successful petitions for collateral relief without the assistance of persons learned in the law." Id. at 14 (Kennedy, J., concurring).

Justice Stevens dissented in Murray. In arguing that a constitutional right to counsel should exist in the initial stages of a habeas corpus proceeding, he emphasized the many obstacles faced by an incarcerated habeas petitioner, as well as the tremendous drain that pro se habeas petitions place upon the judicial system:

> The State already appoints counsel to death row inmates who

> succeed in filing postconviction petitions asserting at least one nonfrivolous claim; therefore, the additional cost of providing . . . death row inmates competent counsel to prepare such petitions should be minimal. [citation omitted]. Furthermore, multiple filings delay the conclusion of capital litigation and exacerbate the already serious burdens these cases impose on the State's judicial system and the legal department. It seems obvious that professional preparation of the first postconviction petition, by reducing successive petitions would result in a net benefit [to the court system].

Murray, 492 U.S. at 29-30 (Steven, J., dissenting).[12/]

The Central District of California's Local Rules 26.8.7(b) and (c) address the foregoing concerns. These rules authorize the appointment of counsel to assist a

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12. Justices Brennan, Marshall and Blackmun joined the dissent. When combined with Justices Kennedy and O'Connor, who joined in the concurrence, a total of six members of the Court took express notice of the plight confronting inmates attempting to challenge their conviction by habeas corpus without the assistance of counsel.

death penalty prisoner in preparing and filing a habeas petition, and provide for issuance of a stay of execution pending this process.

The appellants do not challenge the validity of these rules. Rather, they argue that a prisoner who seeks the appointment of counsel and a stay of execution under the rules must allege some federal constitutional violation to provide the district court with a necessary habeas "proceeding" to give it a jurisdictional base to support a stay of execution. The appellants assert it is a minor burden at most to require a prisoner to allege some constitutional violation. They argue all the prisoner need do is file something that can be interpreted as a habeas corpus petition, no matter how inartfully it may be drawn. Thereupon, according to the thrust of the appellant's argument, a long-suffering district court

through the process of reviewing the petition and allowing amendments will assist the prisoner in eventually coming up with a reasonably adequate habeas petition.

We reject this argument. The Central District rules do not require the filing of a habeas petition as a prerequisite to the issuance of a stay order. Neither does the federal habeas corpus statute. See 28 U.S.C. 2251. Although there is no constitutional right to the appointment of counsel in a death penalty habeas proceeding, this does not preclude a district court from appointing counsel in such a case. Cf. Murray, 492 U.S. at 10, n. 5 (State of Virginia not constitutionally required to appoint counsel for a death penalty habeas petitioner, but its courts have statutory authority to do so). If a district court can appoint counsel to represent a death

penalty habeas petitioner, surely it can issue a stay of execution when necessary to make the appointment and to allow appointed counsel reasonable time to do his job. Otherwise, the prisoner could be executed before appointed counsel could be found or before that counsel could undertake the task for which he was appointed. The habeas process need not tolerate the possibility of such a perverse absurdity.

We conclude that the underlying purpose of the writ of habeas corpus requires us to view the application for the appointment of counsel to assist in the preparation of a death penalty prisoner's habeas corpus petition as an integral part of the habeas corpus process under section 2251. Viewed in this manner, a habeas corpus proceeding is pending before a federal district court when such an application is filed.

The appellants cite to Rule 3 of the Federal Rules of Civil Procedure which provides that "[a] civil action is commenced by filing a complaint in the court." They argue by analogy that a habeas corpus proceeding under section 2251 cannot "commence" until something which can be interpreted as a petition for habeas corpus relief is filed. We disagree.

While it is true that a habeas corpus proceeding is civil in nature, see, e.g., Kurtz v. Moffitt, 115 U.S. 487, 494 (1885), it is equally true that such a proceeding is dramatically different from any other type of civil action. As the Supreme Court has stated, habeas corpus proceedings are of "'fundamental importance . . . in our constitutional scheme' because they directly protect our most valued rights." Bounds, 430 U.S. at 827 (quoting Johnson, 394 U.S. at 485).

As a result, courts are not bound to systematically apply traditional rules governing civil proceedings when to do so would be inconsistent with the overriding purpose of the federal habeas corpus statute.[13/]

Appellant's assertion that the Anti-Injunctions Act prevents the district court from ordering a stay of Brown's execution is also without merit. The

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13. Rule 11 of the Rules Governing Section 2254 Causes in United States District Courts, enacted by Congress in 1977, recognizes that the Civil Rules do not necessarily control habeas corpus proceedings. Rather, the Civil Rules, "to the extent that they are not inconsistent with [the Habeas Corpus Rules], may be applied, when appropriate, to [habeas corpus] petitions . . . ."

The Advisory Committee notes following Rule 11 further clarify that, "The court does not have to rigidly apply rules which would be inconsistent or inequitable in the overall framework of habeas corpus. Rule 11 merely recognizes and affirms their discretionary power to use their judgment in promoting the ends of justice." See also Harris, 394 U.S. at 299.

Anti-Injunction Act provides that, "[a] court of the United States may not grant an injunction to stay any proceeding in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." The federal habeas corpus statute, however, clearly constitutes an "expressly authorized" exception to the Act. Mitchum v. Foster, 407 U.S. 225, 234-35 (1972). As a result, the Anti-Injunction Act does not prevent a district court from staying a state court proceeding pursuant to 28 U.S.C. 2251.

CONCLUSION

We hold that the application for the appointment of counsel to assist a death penalty prisoner in preparing a petition for federal habeas corpus relief, and for a stay of execution, filed pursuant to the Central District of California Local Rules 26.8.7(b) and (c), constitutes part of a

"habeas corpus proceeding" as set forth in 28 U.S.C. 2251. As such, the district court had jurisdiction to stay Brown's execution pending the appointment of counsel and the filing of a habeas petition.

AFFIRMED.

APPENDIX B

FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN G. BROWN,	No. 90-56127
Petitioner-Appellee,	
v.	D.C. No. CV-90-2815-AWT
DANIEL VASQUEZ, Warden, DANIEL E. LUNGREN, Attorney General of the State of California,	ORDER AND AMENDED OPINION
Respondents-Appellants,	

Appeal from the United States District Court for the Central District of California
A. Wallace Tashima, District Judge, Presiding

Argued and Submitted August 29, 1991
Pasadena, California

Filed December 31, 1991
Amended February 19, 1992

Before: Betty B. Fletcher, David R. Thompson and Edward Leavy, Circuit Judges.

Opinion by Judge Thompson

ORDER

The opinion filed December 31, 1991 is amended as follows:

At page 17436 of the slip opinion, seventh line from the top, immediately after the sentence that ends "in such case." and before the cite "*Cf. Murray* . . ." the following is inserted: *See* 18 U.S.C. § 3006A (a)(2)(B) (United States district court may provide counsel to persons seeking habeas relief where "the interests of justice so require");

The signal preceding the cite to *Murray* is changed from *Cf.* to *cf.*

The mandate shall now issue.

APPENDIX C

John G. BROWN, Petitioner,

v.

Daniel VASQUEZ, Warden of San Quentin State Prison, Respondent.

No. CV 90-2815 AWT

United States District Court, C.D. California.

Sept. 4, 1990.

MEMORANDUM ORDER ON MOTION TO VACATE STAY OF EXECUTION

TASHIMA, District Judge.

BACKGROUND AND PROCEDURAL SUMMARY

This is a death penalty "habeas corpus" case. Petitioner was convicted of murder of a peace officer in California state court and was sentenced to death. The conviction and sentence have been affirmed on appeal. *People* v. *Brown*, 46 Cal.3d 432, 250 Cal.Rptr. 604, 758 P.2d 1135 (1988), *cert denied*, 489 U.S. 1059, 109 S.Ct 1329, 103 L.Ed.2d 597 (1989). On March 14, 1990, the California Supreme

Court denied petitioner's petition for writ of habeas corpus. The Orange County Superior Court then set petitioner's execution date for June 8, 1990.

On June 1, 1990, acting *pro se*, petitioner filed a "Request for Appointment of Counsel in Death Sentence Case and For Stay of Execution of Death Sentence." This "Request" was accompanied by petitioner's declaration in which he verifies that he is under imminent sentence of death, that the attorney who represented him in state court is unavailable to represent him in his federal habeas proceedings and that he cannot afford to retain an attorney. The declaration further states: "I intend to file a petition for writ of habeas corpus in this Court, alleging federal constitutional errors which entitle me to relief from the judgment of death. I need

the assistance of counsel in preparing and litigating the petition."

On June 1, the court issued an order staying execution of the sentence for a 45-day period, pursuant to Local Rule 26.-8.7(b) (the 45-day stay).[1/] At the time the 45-day stay was issued, no other pleading had been filed by petitioner. Shortly thereafter, on June 21, respondent, who is the warden of San Quentin Prison, noticed a motion to vacate the stay of execution. On July 7, the 45-day stay was extended for an additional 30

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1. Local Rule 26.8.7(b) provides:
Where counsel in state court proceedings . . . is . . . not available or qualified to proceed, the selection panel will designate an attorney from the panel who will assist an indigent petitioner in filing pro se applications for appointment of counsel and for temporary stay of execution. Upon the filing of this application the district court shall issue a temporary stay of execution and appoint counsel from the panel of attorneys certified for appointment. The temporary stay will remain in effect for forty-five (45) days unless extended by the court.

days, primarily because the court had not yet secured qualified counsel for appointment. The hearing date of respondent's motion also was continued. Finally, on July 30, the court was able to appoint counsel to represent petitioner. On August 8, petitioner, through appointed counsel, filed his opposition to respondent's motion to vacate the stay of execution and also applied for the 120-day stay under Local Rule 26.8.7(c) (the 120-day stay).[2/] The 120-day stay was granted on August 10 and remains in effect. Respondent's motion to vacate the

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2. Local Rule 26.8.7(c) provides, in relevant part:

> Where counsel new to the case is appointed, upon counsel's application for a temporary stay of execution accompanied by a specification of nonfrivolous issues to be raised in the petition, the district court shall issue a temporary stay of execution unless no nonfrivolous issues are presented. The temporary stay will remain in effect for one hundred twenty (120) days to allow newly appointed counsel to prepare and file the petition.

stay of execution was heard and orally denied on August 13. Because there is little case law on the issue tendered by this motion, the court here sets forth an explanation of the reasons for its ruling denying respondent's motion.[3/]

As the above summary of the proceedings to date indicates, petitioner has not yet filed a petition for writ of habeas corpus--certainly not any pleading denominated as such. Based on this procedural posture, respondent contends

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3. The Local Rules under which both the 45-day stay and the 120-day stay were issued are part of Local Rule 26.8, which is entitled "Special Requirements for Habeas Corpus Petitions Involving the Death Penalty." This rule is, essentially, a "uniform" rule, having been adopted by all of the district courts in California with only minor variations. *See* E.D.Cal. Local Rule 191; N.D.Cal Local Rule 295; S.D.Cal. Local Rule 295-2. The purpose of this rule, as even a cursory review will disclose, is to permit the orderly hearing and determination of capital habeas cases and to avoid, to the extent possible, last-minute stays of execution and midnight telephone calls.

that this court has no jurisdiction to issue a stay of execution. According to respondent, a federal district court acquires jurisdiction to issue a stay of execution only after a habeas petition is filed. *See* 28 U.S.C. § 2251. Thus, the issue is whether or not a district court has jurisdiction to issue a stay of execution before a habeas petition is filed, on the basis of a request for appointment of counsel and the *pro se* representation that petitioner intends to file a habeas petition alleging non-frivolous federal constitutional error.[4/] Petitioner has advanced a number of grounds justifying issuance of a stay

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4. The alleged federal constitutional errors which petitioner intends to present are non-frivolous in the sense that petitioner states that such errors "entitle me to relief from the judgment of death."

prior to the filing of a habeas petition; however, only one requires discussion.[5/]

DISCUSSION[6/]

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5. However, because respondent cites it as controlling Circuit authority, a word must be said about *Reese* v. *Teets*, 248 F.2d 147 (9th Cir. 1957). Respondent relies on it for the proposition that a district court "has no power to stay the execution of judgment of a state court save as an incident to the exercise of its jurisdiction in habeas corpus." *Id.* at 149. The court agrees with petitioner that the reason why *Reese* was decided the way it was no longer obtains; therefore, it does not control in the present circumstances. *Reese's* no jurisdiction holding was based on then-controlling case law that a state prisoner was required to petition for certiorari from the denial of his state habeas petition before seeking federal habeas relief. *Id.* at 148. *See Darr* v. *Burford*, 339 U.S. 200, 216-17. 70 S.Ct 587, 596-97, 94 L.Ed 761, (1949). That holding of *Darr* was subsequently overruled, some years after *Reese*. *See Fay* v. *Noia*, 372 U.S. 391, 435, 83 S.Ct. 822, 847, 9 L.Ed.2d 837 (1963). Thus, the exhaustion requirement on which *Reese* rested is no longer good law and *Reese* was an exhaustion case. It does not discuss at all the All Writs Act.

6. The discussion that follows applies equally to both the 45-day stay and the 120-day stay. An argument could be made that the motion is now moot with

The All Writs Act provides:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

28 U.S.C. § 1651(a). In the leading case of *FTC* v. *Dean Foods Co.*, 384 U.S. 597, 86 S.Ct. 1738, 16 L.Ed.2d 802 (1965), the Supreme Court held that the All Writs Act authorized a court of appeals to issue an injunction against a merger in order to preserve the possibility of reviewing the

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respect to the former stay because it has been superseded by the latter. However, the 45-day period is so short that, as in this case, a motion to vacate that stay could not be heard and determined before the stay expired or was superseded. Thus, under the well-established doctrine of "capable of repetition yet evading review," *see, e.g. Murphy* v. *Hunt*, 455 U.S. 478, 482, 102 S.Ct. 1181, 1183, 71 L.Ed.2d 353 (1982) (per curiam), the court holds that respondent's motion is not moot as to the 45-day stay granted under Local Rule 26.8.7(b).

decision of the Federal Trade Commission (FTC) that the merger would violate the antitrust laws even before a petition for review was filed. The Court cited numerous cases for the proposition that the power "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may later be perfected." *Id.* at 603, 86 S.Ct. at 1742.[7/] Respondent seeks to distinguish *Dean Foods* on the ground that once an action reviewable by the appellate court starts, "the exclusive jurisdiction of the court of appeals to review the final outcome also starts." On the other hand, respondent contends, a district court's jurisdiction does not commence until an action is filed in that court. Thus,

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7. *See also in Re Grand Jury Proceedings United States*, 626 F.2d 1051, 1059 (1st Cir.1980)(writ issued to preserve evidence on appeal, although notice of appeal not yet filed, in aid of potential jurisdiction).

potential jurisdiction can only be preserved by an appellate court. The agreement is mistaken.

Under the Federal Trade Commission Act, 15 U.S.C. § 45(c), a petition for review of an order of the FTC, filed with a court of appeals, is the initial entry of such an action into the Article III court system. Likewise, a habeas petition to review a state court conviction, filed with a district court, is also the initial entry of such an action into the Article III court system. Thus, the analogy between *Dean Foods* and a habeas proceeding is quite compelling. The procedural posture in both *Dean Foods* and the case at bench are identical: The court issuing the stay was the initial federal court with the potential jurisdiction to hear the matter on the merits and no petition initiating the action had yet been filed. *Dean Foods* expressly hold that the

authority of an appellate court "is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected." 384 U.S. at 603-04, 86 S.Ct. at 1742, *quoting Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 63 S.Ct. 938, 87 L.Ed. 1185 (1943). In short *Dean Foods* authorizes issuance of a writ under the All Writs Act if it is necessary to preserve a court's potential jurisdiction.[8/]

Respondent's argument that specific non-frivolous constitutional error must be alleged in the initial pleading in order to make clear that such potential

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8. It is somewhat ironic that respondent should take the opposing position in this case. California itself has succeeded in the Supreme Court in obtaining a stay *before* a petition for writ of certiorari was filed. See *California* v. *Velasquez*, 445 U.S. 1301, 100 S.Ct. 1333, 63 L.Ed.2d 595 (1980) (Rhenquist, J., in chambers).

jurisdiction will exist is an argument going to the merits.[9/] Moreover, the cases impose no such requirement. For example, in *I.T.T. Community Dev. Corp.* v. *Barton*, 569 F.2d 1351, 1359 n. 19 (5th Cir. 1978), the court held: "When potential jurisdiction exists, a federal court may issue status quo orders to ensure that once its jurisdiction is shown to exist, the court will be in a position to exercise it." At this stage, petitioner has sufficiently shown that potential habeas jurisdiction exists: He has stated under oath, *pro se*, that his conviction and sentence of death are final; that he

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9. Respondent concedes that, "The All Writs Act may be used to preserve direct appellate jurisdiction," but contend that it may not be used by a district court "to create habeas corpus jurisdiction in the absence of a specific constitutional issue." This distinction is contrary to the plain wording of the statute. The All Writs applies to "*all courts* established by Act of Congress" (emphasis added), not just to appellate courts.

has exhausted available state remedies; and that "federal constitutional errors which entitle [him] to relief from the judgment of death" can be alleged.[10/] To expect more from a *pro se* petitioner who is entitled to, but who has not been furnished with, appointed counsel may itself amount to the denial of a constitutional right.

Finally, respondent relies on *Demosthenes* v. *Baal*, ____ U.S. _____, 110 S.Ct. 2223, 109 L.Ed.2d 762 (1990) (per curiam), as recent, controlling authority which requires a habeas petition to be filed as a prerequisite to the issuance of a stay. They misconstrue the case. In fact, in *Demosthenes*, a petition had been

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10. The issue is not present with respect to the 120-day stay. As required by Local Rule 26.8.7(c), in his application for that stay, counsel made a preliminary specification of non-frivolous constitutional issues which could be raised. Counsel has specified six separate issues which are summarized in three pages.

filed by the prisoner's parents acting as his "next friends." The narrow holding of this case, in vacating the stay, is that the requirement for next friend standing, as recently set forth in *Whitmore* v. *Arkansas*, _____ U.S. _____, 110 S.Ct. 1717, 109 L.Ed.2d 135 (1990), had not been met. The Court did state, as quoted by respondent,

> federal courts are authorized by the federal habeas statutes to interfere with the course of state proceedings only in specified circumstances. Before granting a stay, therefore, federal courts must make certain that an adequate basis exists for the exercise of federal power.[11/]

Demosthenes, 110 S.Ct. at 2226. This is petitioner's first federal petition after exhaustion of state remedies. He represented, *pro se*, that he was able to

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11. *Demosthenes*, like *Reese*, *see* footnote 5, *supra*, did not, since it had no occasion to do so, address a district court's power to issue a stay under the All Writs Act.

allege federal constitutional error. His newly-appointed counsel has subsequently filed a three-page specification of non-frivolous constitutional issues which he believes could be raised in the petition.[12/] Thus, this is a proper case for a habeas proceeding. Petitioner has adequately demonstrated that at least the potential for habeas jurisdiction exists. The All Writs Act, as construed in *Dean Foods*, furnishes "an adequate basis" for the granting of both the 45-day stay and the 120-day stay in order to preserve this court's potential habeas jurisdiction.

IT IS ORDERED that respondent's motion to vacate the stay of execution of the sentence of death is DENIED.

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12. It may be noted that the California Supreme Court did find error and, in one instance, it was uncertain whether the error was federal constitutional error; however, it further found that the error was harmless. *People* v. *Brown*, 46 Cal.3d at 446-48, 250 Cal.Rptr. 604, 758 P.2d 1135.

APPENDIX D

CHART ONE

CASES IN WHICH UNITED STATES DISTRICT COURTS IN CALIFORNIA HAVE STAYED STATE ORDERED EXECUTIONS IN THE ABSENCE OF A PETITION FOR WRIT OF HABEAS CORPUS

NYF=Habeas Petition Not Yet Filed

Petitioner's Last Name	District Court Case Number	District	Date of stay	Date Habeas Petiton Filed
1.Anderson	CV-92-0488-JGD	CD	1-24-92	NYF
2.Bean	CIV-S-90-0648-EJG-GGH	ED	6-8-90	7-18-91
3.Bell	C-91-1115-FMS	ND	4-12-91	NYF
4.Boyde	CV-91-2522-WDK	CD	5-13-91	NYF
5.Brown	CV-90-2815-AWT	CD	6-1-90	11-06-91
6.Burton	CV-91-1652-AWT	CD	3-27-91	NYF
7.Caro	C-89-1400-GPV	ND	4-24-89	4-27-90
8.Carrera	CV-F-90-478-EDP-P	ED	8-6-90	8-26-91
9.Coleman. C.	C-90-1588-VRW	ND	6-1-90	7-15-91
10.Coleman, R.	C-89-1906-RFP	ND	6-2-89	1-19-90

Petitioner's Name	District Court Case Number	District	Date of stay	Date Habeas Petiton Filed
11.Douglas	CV-91-3055-RSLW	CD	6-7-91	NYF
12.Fields	CV-92-0465-RG	CD	1-23-91	NYF
13.Frank	CV-91-6287-AHS	CD	11-22-91	NYF
14.Ghent	C-90-2763-WAI	ND	10-1-90	NYF
15.Hamilton	CV-F-90-363-OWW-P	ED	6-18-90	12-03-91
16.Howard	CV-88-7240-WJR	CD	1-24-89	9-25-89
17.Hunter	C-90-3275-JW	ND	11-26-90	NYF
18.Jackson	CV-91-6983-JG-DEE	CD	8-8-91	NYF
19.Jennings,M.	C-89-1360-WAI	ND	11-7-89	4-17-91
20.Jennings,W.	CV-F-91-684-OWW-P	ED	12-16-91	NYF

Petitioner's Name	District Court Case Number	District	Date of stay	Date Habeas Petiton Filed
21.Johnson	C-90-3219-DLJ	ND	11-9-90	NYF
22.Kimble	CV-90-4826-SVW	CD	9-12-90	9-17-91
23.Lang	CV-91-4061-JMI	CD	7-30-91	NYF
24.Mattson	CV-91-5453-WJR	CD	10-9-91	NYF
25.McLain	CV-89-3061-JGD	CD	5-18-89	12-28-90
26.Miller	CV-91-2652-KN	CD	5-16-91	NYF
27.Miranda	CV-89-7130-RJK	CD	12-15-89	NYF
28.Morales	CV-91-0682-DT	CD	2-8-91	NYF
29.Odle	C-88-4280-CAL	ND	10-24-88	5-31-89
30.Ramirez	CV-91-3802-CBM	CD	7-12-91	NYF

Petitioner's Name	District Court Case Number	District	Date of stay	Date Habeas Petiton Filed
31.Rich	CV-S-89-0823-EJG-GGH	ND	6-8-89	NYF
32.Robbins	CV-91-4768-TJH	CD	9-4-91	NYF
33.Siripongs	CV-89-6530-WDK	CD	11-9-89	7-6-90
34.Stankewitz	CV-F-91-616-OWW-P	ED	11-15-91	NYF
35.Thompson,R.	CV-90-6605-JMI	CD	12-15-90	NYF
36.Thompson,T.	CV-89-3630-RAG	CD	6-15-89	1-16-90
37. Turner	CV-F-91-153-REC-P	ED	3-29-91	NYF